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No. 98-189

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

STEPHANÉ BOURCHIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION
DES ACTIONS DE CARBON;

Petitioners,

vs.

GENERAL MOTORS CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
A. Introduction	1
B. The Facts	3
1. The Sale of De Carbon Company to DPOC and the Governing Arbitration and Choice of Law Agreements	3
C. The "Put" and Subsequent French Litigation	5
1. Petitioners Sue in Louviers to Have A Third Evaluator Appointed	5
2. DPOC Commences an ICC Arbitration in Paris	6
3. Petitioners Sue to Have an "Administrator" Consider Their Complaints	7
D. Proceedings Below	9
II. ARGUMENT	10
A. Ten Circuits Agree On the Fundamental Principle	11
B. Petitioners' Mini Split On a Micro-Issue Is Not Grounds for Review	14
1. The Three Cases Turning On Labels	15
2. The Principled Resolution	17
C. In Any Case, This Nonissue Is Easily Avoided	18
D. The Ninth Circuit's Ruling Squarely Accords With This Court's Clear Finality Standard	20
III. CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Adair Bus Sales v. Blue Bird Corp., 25 F.3d 953 (10th Cir. 1994) 14, 16, 19

Altman Nursing, Inc. v. Clay Capital Corp., 84 F.3d 769 (5th Cir. 1996) 11, 12, 13, 14, 20

American Casualty Co. of Reading, Pennsylvania v. L-J, Inc., 35 F.3d 133 (4th Cir. 1994) 13, 14

Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793 (10th Cir. 1995) 15, 16, 19

Arnold v. Arnold Corp. Printed Communications for Bus., 920 F.2d 1269 (6th Cir. 1990) 14, 16, 17

Behrens v. Pelletier, 116 S. Ct. 834 (1996) 17, 20

Carnation Co. v. Pacific Westbound Conf., 383 U.S. 213 (1966) 18

Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58 (2d Cir. 1993) ..... 12, 14.

Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93 (8th Cir. 1994) 11, 13

Jefferson v. City of Tarrant, 118 S. Ct. 481 (1997) 20

Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 20

McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997) 12, 13, 14, 17, 18

McDermott Int'l Inc. v. Underwriters at Lloyds, 981 F.2d 744 (5th Cir.), *cert. denied*, 508 U.S. 951 (1993) 11

TABLE OF AUTHORITIES – Continued

Page

Napleton v. General Motors Corp., 138 F.3d 1209 (7th Cir. 1998) 12, 13, 14, 17, 18

Nationwide Insurance Co. v. Patterson, 953 F.2d 44 (3d Cir. 1991) 15, 16

Perera v. Seigel Trading Co., 951 F.2d 780 (7th Cir. 1992) 21

Seacoast Motors of Salisbury, Inc. v. Chrysler Corporation, 143 F.3d 626 (1st Cir. 1998) 12, 17

Thomson McKinnon Sec., Inc. v. Salter, 873 F.2d 1397 (11th Cir. 1989) 14

Zosky v. Boyer, 856 F.2d 554 (3d Cir. 1988) .. 13, 14, 15, 16

STATUTES

9 U.S.C. § 3 ..... 16, 18, 19

9 U.S.C. § 9 ..... 13, 14, 18

9 U.S.C. § 10 18

9 U.S.C. § 15 14

9 U.S.C. § 16 20

9 U.S.C. § 16(a)(1)(A-C) 21

9 U.S.C. § 16(a)(3) 14, 16, 21

9 U.S.C. § 16(b)(2) 3

9 U.S.C. § 16(b)(3) 3

9 U.S.C. § 207 18

28 U.S.C. § 1257 20

28 U.S.C. § 1291 ..... 3, 20

28 U.S.C. § 1297 20

I. STATEMENT OF THE CASE

A. Introduction

This is a forum shopping case. Petitioner Stephane Bourcier De Carbon is a French citizen, and petitioner The Societe Civile De Gestion Des Actions De Carbon (the "Holding Company") is a French company. It is owned by Stephane Bourcier De Carbon, his brothers (Axel and Roland) and the estate of their father (Christian), also French citizens. (ER 185, Tab 9)[1] Societe Francaise Des Amortisseurs De Carbon, S.A. ("De Carbon Company") is a French company, most of whose shares were owned by the Holding Company. The Holding Company transferred 60% of its, and thus the De Carbon family's, De Carbon Company shares to respondent-defendant Delco Product Overseas Corporation ("DPOC") in January 1988. (ER 211-36, 226-27) The sale took place in France, pursuant to a French contract, governed by French law.

Four and a half years ago, members of the De Carbon family exercised their right under that French contract and demanded that DPOC purchase the rest of their stock. A dispute arose almost immediately regarding the price of the stock which, by the terms of the contract, hinges on the total value of the De Carbon Company. The De Carbons pursued in France a variety of legal strategies to have the price set to their liking. The gist of their legal

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[1] References to Appellants' Excerpt of Records filed in the Ninth Circuit are preceded by "ER"; to Petitioners' Brief in Support of Certiorari by "Peti. Br."; to Appellees' Supplemental Excerpts of Record by "SER"; and to Appellees' Request for Judicial Notice by "AERJN, Ex.___."

claims has been the same all along: that DPOC and its parent, General Motors Corporation ("GM"), depressed the value of De Carbon Company by taking its technology, self-dealing, and usurping a promised opportunity for De Carbon Company to expand its North American operations.

Arbitration is the contractually prescribed mechanism – and Paris the place – for resolving those claims. Accordingly, the De Carbons have litigated them in France for years, first before a neutral evaluator, then an administrator, then an International Chamber of Commerce (ICC) arbitration panel. The De Carbons however did not succeed on the merits before those tribunals: The neutral evaluator, the administrator and his expert assistants, and the arbitrators (in all, no fewer than seven different authorities) rejected the De Carbons' claims of wrongdoing.

Having lost in France, the De Carbons came to the United States District Court for the Northern District of California in quest of a more hospitable forum, and filed this lawsuit. It makes essentially the same claims the De Carbons have pursued in France all these years: that GM took technology and corporate opportunities from De Carbon Company, and thereby depressed the value of the De Carbons' stock. That transparent effort to end-run French law, French courts and French arbitration was not well received in France; while this case was pending in the District Court, the Court of Appeal in Paris found the De Carbons had engaged in "purely a delaying tactic," rejected their appeal and awarded DPOC damages.

The District Court in California found the De Carbons' claims arbitrable, in France, as they plainly were, and directed that arbitration proceed there. Nevertheless, the De Carbons refused to proceed there, and instead appealed the District Court's interlocutory order to the Ninth Circuit, another delaying tactic. The Ninth Circuit properly dismissed that "appeal," so the De Carbons petitioned this Court for review, still another delaying tactic.

This case presents no esoteric issue regarding the interpretation of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, at 28 U.S.C. § 1291,[2] and no issue that matters at all. The Ninth Circuit adhered to the fundamental principles regarding appealability laid down by this Court and endorsed by virtually all circuit courts, and properly dismissed this interlocutory appeal. The real issue is how long petitioners can avoid doing what they promised to do – arbitrate these disputes – by "delaying tactics" that have already offended the French tribunals they have been before. This petition should be denied.

B. The Facts

1. The Sale of De Carbon Company to DPOC and the Governing Arbitration and Choice of Law Agreements

Ten years ago, in January 1988, petitioners sold a majority (60%) interest in De Carbon Company to DPOC.

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[2] Petitioners cite to 9 U.S.C. § 16(b)(2), relating to interlocutory appeals. (Peti. Br., p. 5) Actually, § 16(b)(3), relating to interlocutory appeals in international arbitrations, is applicable.

Four Stock Transfer Agreements govern the transaction: a Pre-Acquisition Agreement (ER 211-36, 226-27, Tab 10), a Share Acquisition and Subscription Agreement (ER 238-273, 270-71, Tab 10), a Shareholder Agreement (ER 275-87, 283-84, Tab 10), and a Supplemental Shareholder Agreement (ER 289-314, 306, Tab 10). Each agreement was signed by Christian, Axel, Stephane and Roland de Carbon; the Holding Company also signed the Shareholder and Supplemental Shareholder Agreements. (ER 211, 238, 275 and 289, Tab 10)

The Supplemental Shareholder Agreement entitled petitioners to "put" their remaining shares to DPOC, and so obligate DPOC to buy them. (ER 289-324, Tab 10) The shares' price would turn on De Carbon Company's value determined by a price-setting mechanism; that mechanism in effect averaged the valuations of two party experts and a third, independent, expert. (ER 192-94, Tab 9; ER 288-314, Tab 10)

Each of the Stock Transfer agreements contains these identical choice of law and arbitration clauses:

> 23. GOVERNING LAW AND JURISDICTION
>
> 23.1 This Agreement and all Attachments and Appendices shall be governed by the laws of France.
>
> 23.2 In the event of any dispute or difference arising out of or relating to this Agreement or the breach thereof, . . . [such] disputes or differences shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules. The site of the arbitration shall be Paris (France). (ER 226-27, Tab 10)

The agreements were executed in counterparts in Geneva, London and Paris. (ER 229, 271, 284-85, and 307, Tab 10).

C. The "Put" and Subsequent French Litigation

In March 1994, petitioners exercised their right to "put" their remaining De Carbon Company stock to DPOC. A dispute over the value of the company arose immediately, triggering the contractual price-setting process. Then disputes arose over the process itself, leading to a tangle of legal proceedings in France. Indeed, petitioners did not sell those "put" shares to DPOC, pursuant to the order of the ICC Arbitration panel in Paris (ER 651-84, Tab 10; AERJN, Ex. B), until October 1996 (five shares were escrowed by the District Court to preserve the Holding Company's standing to appeal, ER 1508-09, Tab 62; AERJN, Ex. B).

1. Petitioners Sue in Louviers to Have A Third Evaluator Appointed

A June 1994 report by Banque Worms (Paris), petitioners' evaluator, valued De Carbon Company at about four times what DPOC's evaluator did, and claimed that De Carbon Company would have been worth even more, had GM and DPOC not (1) misappropriated certain De Carbon Company technology, (2) caused De Carbon Company to sell products to DPOC at favorable prices (a so-called "price reduction"), and (3) failed to make good on promises to develop the American automobile market for De Carbon Company. (ER 193, Tab 9; ER 354-69, Tab 10)

These allegations were and remain the essence of petitioners' claims.

Petitioners then petitioned the Commercial Court of Louviers to appoint a third evaluator. That petition was initially rejected, but in January 1995, the Rouen Court of Appeals appointed M. Harmand as the third evaluator. On June 6, 1995, M. Harmand valued De Carbon Company at a price much closer to DPOC's than to petitioners' evaluator's. (ER 196-97, Tab 9; ER 372-462, Tab 10) Under the pricing mechanism petitioners had agreed to, this resulted in a valuation that disappointed petitioners. (ER 198-99, Tab 9; ER 671, Tab 10)

2. DPOC Commences an ICC Arbitration in Paris

In October 1994, after petitioners filed suit in Louviers, DPOC invoked the Supplemental Shareholder Agreement's arbitration clause, submitting to ICC Arbitration in Paris whether the Banque Worms evaluation was a "fair value" assessment of De Carbon Company's worth. (ER 195, Tab 9, ER 512-31, Tab 10) Petitioners filed the equivalent of cross-complaints in December 1994. (ER 136, Tab 9, ER 532-563, Tab 10). That filing once again argued that De Carbon Company, and therefore petitioners' stock, had been devalued by DPOC's allegedly unlawful transfer of technology, the so-called price reduction and the supposed failure to exploit North American market opportunities. (*Id.* at ER 540-43, Tab 10) However, petitioners did not formally advance damages cross-complaints based on these acts. The arbitration panel's "Terms of Reference," which determined the scope of that

arbitration, therefore did not include damages claims. (ER 1177-78, Tab 36)

Petitioners later regretted this. In September 1996, they tried to raise damages claims in arbitration – the same claims they brought to California.[3] They were denied permission, however, because they had not done so before the Terms of Reference were set in May. (ER 1177-78, Tab 36) (Petitioners are free to seek damages in a new arbitration, but, although the District Court directed them to arbitration, instead have pursued their delaying tactics. (ER 1178-80, Tab 36; pp. 9-10, below))

The ICC Arbitration nonetheless considered at great length petitioners' claims about the technology transfer, the price reduction, and the North American opportunity. Indeed, the arbitrators considered reports from two experts appointed in a third proceeding (see below) on those subjects. However, the arbitration did not improve petitioners' position. The arbitrators' July 1996 decision, with due regard to the court-appointed third evaluator's findings (pp. 5-6, above), set the same price he had. (ER 198-99, Tab 9; ER 651-84, Tab 10)

3. Petitioners Sue to Have an "Administrator" Consider Their Complaints

In February 1995, petitioners successfully petitioned the Louviers court again, this time for the appointment of an "administrator" to evaluate the price reduction, the

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[3] Petitioners argued that their damages claims were subject to arbitration under the Pre-Acquisition Agreement. (ER at 605-06, 610-11, Tab 10)

technology transfers and whether DPOC committed any other possible frauds or abuses. (ER 197-98, Tab 9) The administrator (M. Langlais) appointed two experts to take evidence and report on the technology transfers and price reductions. But once again, petitioners' claims were rejected. In July and November 1996, M. Langlais' preliminary reports found (based in part on M. Bonet's, an intellectual property expert's, opinions) that the technology transfers were effective and (based on M. Blois', an accounting expert's, opinion) that the price reduction was well-justified. (ER 199-200, Tab 9; ER 753-812, Tab 10) Accordingly, petitioners were denied relief.[4]

The net result of these three proceedings was that petitioners did not get the price for their shares they wanted, but were obligated to transfer them to DPOC at the 38 million FRF price established in the proceedings. Then just as soon as the outcome was clear in France, petitioners filed this suit in the Northern District of California to avoid it. That is particularly offensive, because the French Court of Appeals sanctioned the De Carbons for their "abusive," "delaying tactics" in trying to avoid the French rulings in France. (ER 824, Tab 11)

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[4] In October 1997, M. Langlais' final report largely confirmed the experts' findings that the technology transfers were proper, the price reduction justified, and no other DPOC frauds or abuses occurred ("it would be paradoxical to call a parent company's attitude improper when, until proof to the contrary, it has ensured its subsidiary's survival by upgrading its production facilities and by providing it with North American outlets at a time when it was out of breath on the European market." (ER 810, Tab 10) (*see also*, ER 200, Tab 9; SER 24, Tab 1))

D. Proceedings Below

This complaint was filed December 30, 1996. Except for substituting U.S. legal labels for French legal theories, petitioners' U.S. case essentially repeats the French charges, and adds the damage claim they neglected to add – but remain free to arbitrate – in France.

The basic claim remained that respondents "raided the De Carbon Company of its trade secrets, know-how, and assets, all in derogation of the duties of loyalty that . . . [petitioners] owed as the controlling shareholder." (ER 8, Tab 1) (*see also* ER 18, 20-21, 29, Tab 1; ER 70, Tab 2) In fact, petitioners revealed at oral argument in the District Court that what they really seek is to have the damages they neglected to address – and still refuse to address – in their French claims in France addressed here. (*See* ER 1307, Tab 41: "the damages for the price reduction and the improper transfer of the technology have never been resolved by any court. We feel that this is a proper forum for that. . . . ")

Petitioners had clearly agreed to arbitrate those claims, however, and respondents moved to dismiss the complaint on that ground, among others. The District Court's order granted respondents' motion on these grounds (Peti. Br., p. A-14):

(1) All appellants' underlying claims were arbitrable pursuant to the Federal Arbitration Act under the arbitration clauses signed by appellants selecting arbitration in France;

(2) All claims against De Carbon Company were dismissed for lack of personal jurisdiction; and

(3) All derivative claims were dismissed for failure to join De Carbon Company, an indispensable party to all derivative claims.[5]

The petitioners then appealed the District Court's order to the Ninth Circuit. Petitioners had, however, made affirmative claims in the District Court that had and have not been resolved. This was, therefore, an "embedded proceeding." Pp. 11-12, below. Therefore, as a long line of authority holds, the appeal was interlocutory, not final, and accordingly the Ninth Circuit dismissed the appeal for lack of jurisdiction. (*See* Peti. Br., p. A-19.)

II. ARGUMENT

The Federal Arbitration Act, 9 U.S.C. § 16(a) and (b), provides for appeals from orders regarding arbitration. Petitioners allege a "deep split" in the circuits regarding the application of 9 U.S.C. § 16(b) to orders directing arbitration in an "embedded" proceeding. But there is no deep, or really any, substantive split. The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all agree to the fundamental, and dispositive, principle: an order directing arbitration in an "embedded" proceeding is not final and therefore not appealable because it is an intermediate step in an action, not the final determination of one. (Part A, below)

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[5] Appellees also moved on *forum non conveniens* grounds, given the overwhelmingly French nature of this dispute, and the proceedings already underway there (ER 841-59, Tab 13). The District Court did not rule on this motion.

Petitioners try to fashion a mini split where no real split exists by pointing to the label sometimes placed on the order. A few circuits, petitioners point out, find that an order directing arbitration in an embedded proceeding but labeled "dismissal" is appealable, while the same order labeled "stay" is not. That is a classic distinction without a difference, and the micro issue it presents is not worthy of this Court's attention. (Part B, below) Indeed, to the extent that micro issue relates to the real world at all, a party can avoid it with no trouble at all. (Part C, below) Moreover, this Court has clearly defined the finality standard, the Ninth Circuit's disposition of this appeal squarely accords with it, and there is no occasion or reason for this Court to define the standard again. (Part D, below)

A. Ten Circuits Agree On the Fundamental Principle

Where one party seeks to compel arbitration and the other to avoid it, and "the only issue before the court is . . . [a] dispute's arbitrability," the proceeding is "independent." *McDermott Int'l Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 746-47 (5th Cir.), *cert. denied*, 508 U.S. 951 (1993); *see also Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 770 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994). Where, on the other hand, "one party or the other seeks some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable dispute)," a motion to compel arbitration is "embedded" with the claims seeking that other

relief. *Gammaro*, 15 F.3d at 95 (quoting *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993)); *see also Altman Nursing, Inc.*, 84 F.2d at 770-71.

Here petitioners brought suit on various claims, and prayed for relief on the merits of them. Respondents defended, on the ground, among others, that the dispute was arbitrable, and moved to dismiss on that ground. Accordingly, that motion was "embedded" with petitioners' claims on the merits, so this was an embedded, not independent, proceeding. No one claims otherwise.

The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits distinguish independent from embedded proceedings. All subscribe to this fundamental principle: an order directing arbitration in an embedded proceeding is not final and so is unappealable. The reason is that that order is subject to further review, and is simply an intermediate step in the proceeding, not a final determination of the full relief sought on the merits.[6]

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[6] *Seacoast Motors of Salisbury, Inc. v. Chrysler Corporation*, 143 F.3d 626, 628 (1st. Cir. 1998) ("The general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefor not immediately reviewable, if the arbitrability issue is 'embedded' "); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1211 (7th Cir. 1998), *application for cert. pending*, No. 98-297 ("We consistently have . . . declined to find jurisdiction over appeals from arbitration orders in embedded proceedings"); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997), *application for cert. pending*, No. 97-1895 ("[I]f the motion to compel arbitration is 'embedded' in a substantive suit pending before the court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and

The reasons are obvious:

1) the merits of the underlying claims have not been addressed, let alone finally decided, *see* Dist. Court Order, Peti. Br. p. A1-14; *Zosky*, 856 F.2d at 559;

2) the initial order compelling the arbitration is subject to review after arbitration is completed and a final order is entered, *McCarthy*, 122 F.3d at 1245; *Napleton*, 138 F.3d at 1215; *Zosky*, 856 F.2d at 559;

3) the arbitration award itself is subject to further review by the District Court, *id.*; *see also* 9 U.S.C. §§ 9 (confirmation of the award), 10 (vacation of award), 11 (modification or correction of the award);

4) petitioners may be satisfied with the arbitration award, thus avoiding any further review or appeals; so

5) the rule prevents piecemeal appeals, "favor[s] arbitration over litigation," *American Cas. Co.*, 35 F.3d at 135, permits the arbitration proceeding to "run its course," *McCarthy*, 122 F.3d at 1245, is generally "the most economical approach," *Napleton*, 138 F.3d at 1214, and "corresponds with the Act's purpose of promoting greater use of arbitration," *Id.*, citing *McCarthy*, 122 F.3d at 1245.

The "deep split" among the circuits that petitioners base their petition upon obviously does not exist.

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therefore not reviewable"); *Altman Nursing, Inc.*, 84 F.3d at 771 ("The appropriate test of finality is whether the order involved an independent or embedded proceeding. An order involving an embedded proceeding is always an interlocutory order"); *Gammaro*, 15 F.3d at 95 ("The action before us is a typical example

B. Petitioners' Mini Split On a Micro-Issue Is Not Grounds for Review

Petitioners do not speak to, let alone challenge, the virtually uniform endorsement of the fundamental principle precluding appeal of an order directing arbitration in

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of an embedded proceeding, and under the construction of section 16 we adopt today, we are therefore without jurisdiction to hear this appeal"); *American Casualty Co. of Reading, Pennsylvania v. L-J, Inc.*, 35 F.3d 133, 136 (4th Cir. 1994) ("[A]n order compelling arbitration 'in an embedded proceeding' . . . is a nonappealable interlocutory order, 'even when all the claims in which the arbitration issue is embedded are resolved by that order' "); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) ("[A]n order can only be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the district court"); *Filanto*, 984 F.2d at 60 ("If the suit is 'embedded,' i.e., a party has sought some relief other than an order requiring or prohibiting arbitration . . . orders directing arbitration are not immediately appealable"); *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) ("[O]rders granting or denying requests to compel arbitration are not final decisions if entered in the course of ongoing actions for legal or equitable relief on the underlying claims"); *Zosky v. Boyer*, 856 F.2d 554, 559 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) ("[O]rders [compelling arbitration] arising out of a law suit 'such as a suit for damages' are interlocutory and not appealable as final orders") (Citations omitted throughout).

Arnold v. Arnold Corp. Printed Communications for Bus., 920 F.2d 1269, 1273-76 (6th Cir. 1990), remarks that a 1988 amendment to § 15 of the Arbitration Act undercuts the "embedded" rule, but the Act does not say that, and no case has followed that dictum. Moreover, in *Arnold* the Court's order directing arbitration was a "dismissal," not a "stay," and on analysis *Arnold* turned on that supposed distinction. *See Altman*, above, 84 F.3d at 771; pp. 15-17, below.

an embedded proceeding. Instead, petitioners point to three circuit court cases holding that such an order is appealable if labeled "dismissal" rather than "stay." (Part B(1), below) Those aberrational cases are ill-reasoned, and they elevate form over substance. Therefore, the better-reasoned authority, including the Ninth Circuit in this case, holds otherwise. (Part B(2), below) But this mini split need not be resolved in any case, because it presents a nonissue; the labeling problem that gives rise to that nonissue, even assuming it otherwise mattered, can be easily avoided and readily solved. (Part C, below)

1. The Three Cases Turning On Labels

Petitioners point to three cases holding that an order directing arbitration in an embedded proceeding is appealable if labeled "dismissal" rather than "stay." The first two, *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991), and *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995), are truly aberrations, even in their own circuits.

Thus *Nationwide*, from the Third Circuit, relies upon *Zosky*, 856 F.2d at 557-59, also from the Third Circuit, stating:

> [In *Zosky* the Third Circuit] reaffirmed our precedent that "an order requiring arbitration is appealable as final . . . 'where it is not merely a step in the judicial enforcement of a claim, not auxiliary to the main proceeding but is the full relief sought. . . . Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief.' "

Nationwide, 953 F.2d at 46 (quoting *Zosky*, 856 F.2d at 557). *Nationwide* goes on to find, without explanation, that an order compelling arbitration in an embedded proceeding labeled "dismissal" is "appealable as final." *Id.* at 46. *Zosky*, on which *National* relies for that holding, is directly at odds with it. *Zosky* makes clear that finality depends upon whether the underlying proceeding is independent or embedded, not on words: "The rule [that an arbitration order in an ongoing proceeding is not appealable] serves the purpose of preventing piecemeal appeals and *minimizes the degree to which appealability depends on the mere form of the order.*" *Id.* at 559-60; emphasis added.

Likewise, *Armijo*, from the Tenth Circuit, relied upon *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994), from the Tenth Circuit. *Adair*, however, held "that an order can *only* be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the District Court." *Id.* at 955; emphasis added. *Armijo* is directly at odds with that holding; for notwithstanding that arbitrability was not "the sole issue before the District Court," *Armijo* held without explanation that the District Court's order labeled dismissal was nonetheless appealable.[7]

Petitioner's third case, *Arnold v. Arnold Corp. Printed Communications for Bus.*, 920 F.2d 1269 (6th Cir. 1990), cites

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[7] *Armijo* simply observed that since there is "no evidence in the record of any request for a stay [under 9 U.S.C. § 3]. . . . the district court's order granting [appellee's] motion to compel arbitration and to dismiss Plaintiff's claim was clearly a final order." *Armijo*, 72 F.3d at 797.

to legislative history, but ultimately also turns on labels: The District Court order compelling arbitration dismissed the embedded action instead of staying it. *Id.* at 1275-76; n.5, above.

2. The Principled Resolution

Petitioners' three cases are out of line, because they ignore the fundamental principle: It "is the nature of the underlying action, not the style of the District Court's decision requiring arbitration, that determines whether . . . [an appellate court] has jurisdiction over appeals from decisions granting arbitrations." *See, e.g., Napleton*, above, 138 F.3d at 1212 (holding dismissal order directing arbitration in embedded case not appealable). To put it another way, determining an order's appealability based on its underlying, embedded, substance, not labels, "avoids elevating form over substance. . . . " *Seacoast Motors*, above, 143 F.3d at 629.[8]

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[8] There is no substantive difference between an order directing arbitration labeled dismissal and a like order labeled stay. In both, the party opposing arbitration simply must arbitrate. If, after arbitration, the party is dissatisfied with the result, in both cases he may return to the district court, and obtain exactly the same review in the district court and the Court of Appeal, including "review of the district court's order compelling arbitration," *McCarthy*, 122 F.3d at 1245; *Napleton*, 138 F.3d at 1214, plus, if warranted by the district court's review, disposition of the merits of his claim. That is another reason why the order is nonappealable, "[t]he requirement of finality precludes consideration of decisions that are subject to revision." *Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996); pp. 20-21, below.

The trial court directed arbitration in this embedded proceeding, and dismissed it. The Ninth Circuit followed *McCarthy*, the fundamental principle, and the overwhelming majority of circuit courts, and so held that ruling unappealable until the arbitration ran its course. That was also the right result. "[A]dherence to the demarcation between independent and embedded proceedings corresponds with the Act's purpose of promoting greater use of arbitration." *Napleton*, 138 F.3d at 1214.

C. In Any Case, This Nonissue Is Easily Avoided

But all of this is much ado about nothing. The fundamental principle holds that an order directing arbitration in an embedded proceeding is nonappealable. That principle is embraced by virtually all circuits. A party moving to compel arbitration in a circuit which distinguishes an order labeled dismissal from an order labeled stay can ensure that the fundamental principle governs, so the order is unappealable; all the party need do is to seek a stay, not a dismissal. He would certainly be entitled to that stay if he applied for it: 9 U.S.C. § 3 provides that a

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Petitioners advise that "the difference between a stay and a dismissal is significant" because of some supposed "statute of limitation dangers." Peti. Br. p. 12, n.12. But the sole authority they cite, *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 222-23 (1966), creates no such danger here, and we know of no authority that does. To the contrary, §§ 9, 10, 11 and 207 of the Act permit a party to attack an arbitration award for a year after it is rendered and, in an international arbitration, three years; that rule is the same whether the arbitration proceeds with or without a court order directing it, and regardless whether such an order, if it exists, is labeled dismissal or stay.

District Court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[9]

That, we submit, is all there is to this manufactured problem. There is no dire need to solve it; it is a non-problem. Indeed, were this Court to grant review and, upon review, embrace the minority position and hold that a "dismissal" in an embedded proceeding is appealable, while a "stay" is not, litigants in all circuits moving to compel arbitration would simply adapt to the ruling; accordingly, thereafter they would move only for stay orders, not dismissals, under 9 U.S.C. § 3. That would ensure that the fundamental principle still governed, so the orders would remain unappealable. Therefore, after the significant investment of this Court's time to hear and decide the case, nothing substantive would change. That is as it should be with rules that elevate form over substance. Substance prevails in the end.

We repeat: This is a nonproblem, and there is no reason to impose on the Court's time to solve it.

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[9] If the district court denied the stay, that would be reversible error. *Armijo*, 72 F.3d at 797, discussing *Adair*, 25 F.3d 953. If the party moving to compel sought dismissal, not a stay, the party resisting arbitration could seek one; 9 U.S.C. § 3 gives that right to either party. Of course, if both parties acceded to dismissal and neither sought a stay, each would have got what he wanted and neither would have anything to complain about. *See Armijo*, 72 F.3d at 797.

D. The Ninth Circuit's Ruling Squarely Accords With This Court's Clear Finality Standard

The Ninth Circuit's ruling accords with the fundamental principle endorsed by virtually all circuits. It also accords with this Court's clear, and fundamental, finality standard: A judgment must be final "in two senses: it must be subject to no further review or correction . . . ; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Jefferson v. City of Tarrant*, 118 S. Ct. 481, 485-86 (1997) (*quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).[10] *Accord, Behrens v. Pelletier*, above, 116 S. Ct. 834, 838 (1996):

> Section 1291 of Title 28, U.S.C. gives courts of appeal jurisdiction over "all final decisions" of District Courts, except those for which appeal is to be had to this Court. The requirement of finality precludes consideration of decisions that are subject to revision, and even of "fully consummated decisions [that] are but steps towards final judgment in which they will merge."[11]

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[10] *Jefferson* arose under 28 U.S.C. § 1257, which governs this Court's review of final decisions of state courts of last resort.

[11] A decision not final under the general standards is not final under 9 U.S.C. § 16; petitioners' claim that § 16 and 28 U.S.C. § 1297 are at odds is wrong. *See Altman Nursing, Inc.*, 84 F.3d at 771-72:

> "Final decision" is a legal term of art traditionally used to distinguish appealable and nonappealable lower court decisions under 28 U.S.C. § 1291 – the general provision governing appellate jurisdiction. Judicial decisions have given meaning to the term of

This District Court's original order directing arbitration was subject to "further review and correction" in the District Court after the arbitration had run its course (p. 13, above), and so was but a "step towards final judgment." The arbitration award itself was subject to review and correction in the District Court once rendered. *Id.* Also the District Court would have to determine the merits of the "embedded" claims, if that were called for either by its ruling on its original order directing arbitration or its ruling on the arbitration award itself. Then the District Court's decision – after the arbitration was completed – as to all those matters would in turn be subject to review and correction in the Court of Appeal. 9 U.S.C. § 16(a)(3).

Therefore, the Ninth Circuit's no-finality ruling squarely accords with this Court's finality standard. There is no occasion for this Court to revisit that clear standard, or articulate it again, and certainly not in this forum shopping case.

> art. Section 16 does not define the term "final decision," nor does it indicate an intent to change the preexisting judicial interpretation of this term of art. As such, we can assume that by using a term of art Congress intended to retain its preexisting meaning. Moreover, [as] section 16 uses very specific language to change the prior law regarding the appealability of interlocutory decisions disfavoring arbitration, 9 U.S.C. § 16(a)(1)(A-C), it seems that Congress would have been equally specific if it had intended to change the preexisting interpretation of "final decision."

(*quoting Perera v. Seigel Trading Co.*, 951 F.2d 780, 783-84 (7th Cir. 1992)).

III. CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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